

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION  
No. 5:07-HC-2113-BR

UNITED STATES OF AMERICA, )  
 )  
Petitioner, ) ) ORDER  
 )  
v. )  
 )  
RICHARD VILLEGAS, ) )  
 )  
Respondent. ) )

On 11 June 2007, petitioner United States of America (“the government”) initiated this proceeding seeking to have respondent Richard Villegas (“Villegas”) civilly committed as a sexually dangerous person under the Adam Walsh Child Protection and Safety Act of 2006 (“Adam Walsh Act”), codified at 18 U.S.C. §§ 4247-4248. Pursuant to 18 U.S.C. § 4247(d), the court conducted an evidentiary hearing in this matter on 30 January 2012.

**I. BACKGROUND**

Villegas was 46 years old at the time of the evidentiary hearing. He testified that he began drinking alcohol at the age of 7 or 8, and he acknowledges a lengthy history of alcohol use. (See also Gov’t Proposed Findings of Fact and Conclusions of Law, DE # 54, at 4 ¶ 9; Resp.’s Proposed Findings of Fact and Conclusions of Law, DE # 53, at 2 ¶ 7.) He also admitted that he used and experimented with various drugs as a teenager and as an adult. (See also Gov’t Ex. 35 at 12-16.)

The parties stipulated to the following facts in the pretrial order: On 24 May 1985, Villegas was convicted of indecent liberties in the Superior Court of Washington for Grant County and sentenced to sixty days imprisonment, twenty months special sexual offender

sentencing alternative, and twenty-four months of community supervision. (Pretrial Order, DE # 48, at 2 ¶ 8.) On 12 December 1986, he was found to have violated the conditions of his judgment and sentence for failing to undergo sexual offender treatment. He was sentenced to thirty days imprisonment. (Id. ¶ 9.) On 1 July 1992, he was again convicted of indecent liberties in the Superior Court of Washington for Grant County and sentenced to forty-six months imprisonment. (Id. ¶ 10.)

On 6 May 1999, Villegas was convicted of (1) a crime on an Indian reservation and (2) abusive sexual contact in the United States District Court for the District of Idaho. He was sentenced to fifty-seven months imprisonment on each count, served concurrently.<sup>1</sup> (Id. ¶ 11.)

On 14 September 2005, Villegas was found to have violated his supervised release for failure to participate in a program of sex offender treatment. He was sentenced to six months imprisonment. (Id. ¶ 12.) On 30 June 2006, he was again found to have violated his supervised release for failure to comply with and/or violating the rules of the sex offender treatment program, leading to his termination from the program. He was sentenced to twelve months imprisonment. (Id. at 3 ¶ 13.)

In addition to these stipulated facts, the court notes that Villegas has received various incident reports while in the custody of the Bureau of Prisons, including being insolent to staff members, refusing to obey orders, refusing program assignments, and fighting. (Gov't Exs. 3 at 17-19; 8 at 2.) He has also been convicted of numerous non-sexual offenses, including driving while under the influence and other alcohol-related offenses, theft in the third degree, and assault

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<sup>1</sup> The factual details underlying Villegas's indecent liberties offenses and his abusive sexual contact offense can be found in the reports submitted by the government's expert witnesses. (See Gov't Exs. 3 at 3-8; 7 at 5-6.) Although Villegas has not stipulated to the specific details of these crimes, the court notes that he did not dispute the accuracy of these details at the evidentiary hearing.

in the fourth degree. (Gov't Ex. 16 at 9-13.)

## II. DISCUSSION

The Adam Walsh Act provides for the civil commitment of “sexually dangerous person[s].” 18 U.S.C. § 4248. Under 18 U.S.C. § 4247(a)(5), a “sexually dangerous person” is one “who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others.” A person is “sexually dangerous to others” if he “suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.” 18 U.S.C. § 4247(a)(6).

Under the Adam Walsh Act, the government has the burden of proving that Villegas is sexually dangerous by clear and convincing evidence. 18 U.S.C. § 4248(d). “The clear and convincing evidence standard is an ‘intermediate standard,’ lying somewhere ‘between preponderance of the evidence and proof beyond a reasonable doubt.’” United States v. Hunt, 643 F. Supp. 2d 161, 179 (D. Mass. 2009) (quoting Addington v. Texas, 441 U.S. 418, 425 (1979)). The government must produce “[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.” Id. (alteration in original) (quoting Black's Law Dictionary 596 (8th ed. 2004)).

Thus, in order to prove that Villegas is a “sexually dangerous person,” the government must prove three elements by clear and convincing evidence: (1) that Villegas engaged in or attempted to engage in sexually violent conduct or child molestation; (2) that Villegas suffers from a serious mental illness, abnormality, or disorder; and (3) that, as a result of the serious mental illness, abnormality, or disorder, Villegas would have serious difficulty in refraining from

sexually violent conduct or child molestation if he were to be released. See 18 U.S.C. § 4247(a)(5)-(6); 18 U.S.C. § 4248.

Three experts testified at the evidentiary hearing. Amy Phenix, Ph.D., and Manuel Gutierrez, Ph.D., testified on behalf of the government. Roy G. Daum, Psy.D., testified on behalf of Villegas as an additional examiner selected pursuant to 18 U.S.C. § 4247(b). (See DE # 36.) The only other witness who testified at the hearing was Villegas, who was called as a witness during the government's case-in-chief.

A. Past Violent Sexual Conduct or Child Molestation

The court finds that the first criterion for commitment under the Adam Walsh Act, that Villegas has “engaged or attempted to engage in sexually violent conduct or child molestation” in the past, is satisfied. 18 U.S.C. § 4247(a)(5). All three experts in this case agree that Villegas has committed acts of sexually violent conduct or child molestation, and Villegas does not dispute that the government has proven the first element. (Resp.’s Proposed Findings of Fact and Conclusions of Law, DE # 53, at 7 ¶ 31.)

B. Serious Mental Illness, Abnormality, or Disorder

To meet its burden of establishing that Villegas is “sexually dangerous to others,” the government must also prove that Villegas “suffers from a serious mental illness, abnormality, or disorder.” 18 U.S.C. § 4247(a)(6). In this case, all three experts agree that Villegas suffers from pedophilia, sexually attracted to females, nonexclusive type.<sup>2</sup> (Gov’t Exs. 3 at 22-23; 8 at 2-3;

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<sup>2</sup> The experts disagree somewhat regarding the other aspects of Villegas’s diagnosis. Dr. Gutierrez has also diagnosed Villegas as suffering from depressive disorder not otherwise specified and personality disorder not otherwise specified with antisocial features. (Gov’t Ex. 8 at 2-3.) Dr. Phenix agrees with the diagnosis of Dr. Gutierrez, but she adds a further diagnosis of alcohol dependence, in a controlled setting. (Gov’t Ex. 3 at 22-23.) Dr. Daum’s additional diagnoses include polysubstance dependence, alcohol dependence, and antisocial personality disorder with borderline features. (Resp. Ex. 2 at 11.)

Resp. Ex. 2 at 11.) Furthermore, Villegas does not dispute that the government has proven this element. (Resp.'s Proposed Findings of Fact and Conclusions of Law, DE # 53, at 7-8 ¶ 32.) Accordingly, the court concludes that the government has proven by clear and convincing evidence that Villegas currently suffers from pedophilia, which is a serious mental illness, abnormality, or disorder.

C. Serious Difficulty Refraining

The real point of dispute in this case involves the third element under the Adam Walsh Act, *i.e.*, whether the government has proven, by clear and convincing evidence, that Villegas, if released, “would have serious difficulty in refraining from sexually violent conduct or child molestation” as a result of his serious mental illness, abnormality, or disorder. 18 U.S.C. § 4247(a)(6). The determination under this prong requires the court to consider Villegas’s volitional control over his actions understood in relation to his mental illness, and it is also informed by the constitutional constraints on the civil commitment scheme. In Kansas v. Crane, 534 U.S. 407 (2002), the United States Supreme Court held that in order to civilly commit someone for sexual dangerousness “there must be proof of serious difficulty in controlling behavior.” Id. at 413. The Supreme Court noted that this standard allows courts wide discretion in relying on a number of different factors relevant to sexual dangerousness. The standard does not have “a particularly narrow or technical meaning;” nor is it demonstrable with “mathematical precision.” Id.

As a result, the court does not construe this criterion for commitment to require proof of any statistical probability of reoffense. The Adam Walsh Act does not ask the finder of fact to determine exactly how likely the respondent is to reoffend, but whether he will have “serious

difficulty" in refraining from doing so. Recidivism rates are circumstantially relevant to the serious difficulty inquiry because offenders who continually expose themselves to punishment may be presumed to have the most difficulty refraining from sexual reoffending. But the ultimate question called for by the Adam Walsh Act concerns the self-control of an individual, not the statistical re-arrest patterns of a given population. Thus, the court considers the recidivism rates associated with Villegas's actuarial scores,<sup>3</sup> but affords them less weight than Villegas's past and current conduct, and the testimony of the experts as a whole.

Here, both Dr. Phenix and Dr. Gutierrez testified that, in their opinions, Villegas would have serious difficulty in refraining from sexually violent conduct or child molestation if released. In contrast, Dr. Daum opined that Villegas would not have serious difficulty in refraining from sexually violent conduct or child molestation. At the evidentiary hearing, Drs. Phenix and Gutierrez identified several factors that they believe significantly increase Villegas's risk of sexual reoffense, including his failure to cooperate with supervision; his commission of offenses while under supervision and in risky situations; his poorly managed anger; his failure to

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<sup>3</sup> Dr. Phenix gave Villegas a score of 6 on the Static 99-R actuarial instrument and a 10 on the Static 2002-R. (Gov't Ex. 3 at 25-29, 31.) These scores place Villegas within the highest risk category for being charged with or convicted of a sexual offense. (*Id.*) Dr. Phenix had also relied on the Minnesota Sex Offender Screening Tool-Revised in assessing Villegas's future risk of reoffense, but she testified at the evidentiary hearing that she no longer uses this instrument due to recent discoveries regarding its lack of validity. (See also Gov't Proposed Findings of Fact and Conclusions of Law, DE # 54, at 10 ¶ 24 n.2.)

Dr. Gutierrez gave Villegas a score of 5 on the Static 99-R actuarial instrument, which indicates a moderate to high risk of reoffense. (Gov't Ex. 8 at 4.) He testified that offenders from a preselected high risk and needs sample with the same score as Villegas have been found to sexually reoffend at a rate of 25.2% within five years and 35.5% within ten years. (*Id.*)

Dr. Daum gave Villegas a score of 6 on the Static 99-R actuarial instrument and a 9 on the Static 2002-R. (Resp. Ex. 2 at 8.) These scores place Villegas within the highest risk category for being charged with or convicted of a sexual offense. Dr. Daum also gave Villegas a score of 21 on the Hare Psychopathy Checklist – Revised, Second Edition, which is below the cutoff score indicated for psychopathy. (*Id.* at 7.) Similar to Dr. Phenix, Dr. Daum testified at the evidentiary hearing that he no longer relies on the Minnesota Sex Offender Screening Tool-Revised in assessing an individual's future risk of sexual reoffense.

complete sex offender treatment; and his ongoing sexual fantasies relating to the rape, bondage, and kidnapping of minor children. Dr. Phenix emphasized that Villegas has experienced violent sexual fantasies involving children both when he has been intoxicated and when he has been sober, that he does not know how to manage these fantasies, and that he gives himself permission to act out on them.

The court agrees with the government that Villegas has had difficulty in complying with the provisions of his supervised release and with following prison rules. However, none of his prison disciplinary infractions related to conduct of a sexual nature, nor did they involve possession of sexually explicit or sexually prohibited materials. At the evidentiary hearing, Villegas freely admitted that he incurred these disciplinary infractions because he does not like being told what to do. While the court finds that Villegas has engaged in insolent behavior while incarcerated, the Adam Walsh Act was not designed to commit someone who is insolent. The fact that Villegas has made various poor choices, some of which have been unlawful, does not demonstrate the lack of control necessary to justify a civil commitment based on sexual dangerousness. Ultimately, Villegas's volitional control must be "viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself" in such a way that distinguishes Villegas "from the dangerous but typical recidivist convicted in an ordinary criminal case." Crane, 534 U.S. at 413. Here, the evidence introduced by the government fails to rise to the degree necessary to distinguish Villegas from the ordinary dangerous recidivist.

In addition, the court disagrees with the government's characterization of Villegas's level of participation in sex offender treatment. (See, e.g., Gov't Proposed Findings of Fact and

Conclusions of Law, DE # 54, at 4-5 ¶ 10; id. at 13 ¶ 30; id. at 19 ¶¶ 45-46.) At the evidentiary hearing, Villegas testified that he participated in sex offender treatment on more than one occasion. In particular, he testified that he began a sex offender treatment program in Coeur d'Alene, Idaho upon his release from prison in 2003. He participated in sex offender treatment for over two years until his dismissal from the program in 2005. He was discharged from the program on 22 August 2005 for having unauthorized intimate relationships with two consenting adult females simultaneously,<sup>4</sup> for having deviant sexual fantasies, and for failure to maintain a "contact log" detailing his contacts with minors. (See also Gov't Exs. 13-14.) Villegas testified that he did have deviant sexual fantasies when he was in the sex offender treatment program, but he did not act on any of them. Moreover, he was not accused of engaging in inappropriate behavior with children or committing any type of violent or contact sexual offense when he was discharged from the program.

Villegas also provided testimony regarding what he learned in the sex offender treatment program. He stated that while in treatment, he was asked to create descriptions of his crimes where he wrote down the victims' point of view and what they may have been feeling. In doing so, he learned how to empathize with his victims. Additionally, he came to understand the impact that his actions had on the families of his victims. Villegas testified that the treatment program helped him to get in touch with emotions that he had not wanted to deal with previously. He was also taught techniques for addressing his deviant sexual thoughts, but he found that some techniques were more helpful to him than others. Significantly, he learned that he can keep from reoffending if he avoids situations where children might be present. Thus, the

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<sup>4</sup> Villegas testified that the program endorsed having one "stable" intimate relationship and that it was not considered acceptable to have an intimate relationship with more than one person during the same period of time.

court finds that although Villegas may not have completed a sex offender treatment program, he has in fact seriously and meaningfully engaged in sex offender treatment.<sup>5</sup> The treatment that he has received is likely to reduce his risk of sexual reoffense.

Furthermore, the court finds that the government's experts have discounted the importance of Villegas's attainment of sobriety. As Villegas's expert, Dr. Daum, has observed:

Mr. Villegas' past criminal history has centered on substance abuse that led to sexual offenses. It is noted that documentation supported the fact that each reported sexual offense occurred while Mr. Villegas was under the influence of illegal substances.

(Resp. Ex. 2 at 14.)

Villegas admitted at the evidentiary hearing that he was drunk during each of the three sexual offenses that he committed. However, he also testified that he has not consumed alcohol since December 1998, that he went through detoxification<sup>6</sup> when he stopped drinking, and that he had no desire to go through the detoxification process again. Additionally, he has not received a single citation relating to the possession or use of alcohol or drugs during his incarceration. He also testified that he completed an alcohol substance abuse treatment program and was able to get his driver's license reinstated. Furthermore, Villegas lived in the community for approximately two and a half years between 2003 and 2005,<sup>7</sup> and he testified that he did not

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<sup>5</sup> Villegas also testified that he declined to participate in the sex offender treatment program at the Federal Correctional Institution in Butner, North Carolina based on the advice of his attorney.

<sup>6</sup> During his testimony, Villegas stated that he went through "DT's" when he stopped drinking alcohol. The court interprets this term to be an abbreviation for delerium tremens, which "is an acute transient disturbance in consciousness caused by the cessation or reduction in alcohol consumption, typically in alcoholics with ten or more years of heavy drinking. Clinical manifestations include rapid heartbeat (tachycardia); wild, agitated behavior; and vivid hallucinations." Gowans v. Astrue, Civil No. SKG-06-2817, 2008 WL 179479, \*3 n.27 (D. Md. Jan. 17, 2008).

<sup>7</sup> Villegas was released from the custody of the Bureau of Prisons on 3 February 2003, and in September 2005, he was sentenced to six months imprisonment for violating a condition of his supervised release. (See Pretrial

consume any alcohol during that time. The government introduced absolutely no evidence to counter Villegas's testimony regarding his maintenance of this significant period of sobriety while living in the community. Nor did the government introduce any evidence to show that Villegas committed any type of sexual offense or any other violation of the law during that period of time.

Thus, the court finds that all of the sexual offenses in this case occurred during a period in which Villegas was dependent upon alcohol and generally lived a maladaptive lifestyle in the context of his daily substance abuse. The court concludes that there is a low likelihood that he will return to a state of unremitting alcohol use as a 46-year-old man who has insight into his substance abuse history and has been in full remission for thirteen years. As a result, it is far from certain that Villegas will have serious difficulty in refraining from acts of sexual violence or child molestation in the future.

Most importantly, the court finds Villegas to be a very credible witness. At the evidentiary hearing, Villegas fully and frankly acknowledged his past crimes, his failures at complying with the terms of his supervised release, and the incident reports that he has received while incarcerated. He expressed a willingness to engage in further sex offender treatment if he is released. He also appears to have a genuine desire and ability to conform his behavior to the law upon his release.

The court realizes that it is possible that Villegas may commit an act of sexual violence or child molestation in the future. "However, in the absence of clear and convincing proof that a serious mental impairment causes an individual to have serious difficulty in controlling his behavior, the constitution requires reliance on the criminal law, rather than a civil commitment,

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Order, DE # 48, at 2 ¶ 12; Gov't Exs. 7 at 6; 12; 13 at 2.)

to deal with that risk.” United States v. Wilkinson, 646 F. Supp. 2d 194, 209 (D. Mass. 2009).

As the government has not presented such clear and convincing proof, Villegas may not be civilly committed.

### **III. CONCLUSION**

For the foregoing reasons, the government has failed to show by clear and convincing evidence that Villegas suffers from a serious mental illness, abnormality, or disorder, as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released. Accordingly, the court concludes that Villegas is not a sexually dangerous person under the Adam Walsh Act and ORDERS that the government release Villegas forthwith to the custody and supervision of the appropriate United States Probation Officer. The Clerk is DIRECTED to close this case.

This 13 March 2012.



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W. Earl Britt  
Senior U.S. District Judge